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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 791

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION,

Petitioner,

vs.

A. WALTER SMITH AND VIRGINIA SMITH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
Counsel for Petitioner,
135 South La Salle Street,
Chicago 3, Illinois.

THE BURTHORP-WARREN PRINTING COMPANY, 215 WEST JACKSON, CHICAGO

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POINT A. Unless trial by jury is demanded by the parties to a declaratory judgment proceeding presenting legal issues as provided in Rule 38(b)(c) of the Federal Rules of Civil Procedure, they are presumed to have waived the right, and the court may not order a trial by jury on its own initiative; where the court does so and treats the findings of such jury as binding upon him, such action constitutes reversible error..... 7

CASES CITED.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a proceeding for a Declaratory Judgment under the Declaratory Judgment Act of Congress of June 14, 1934, as Amended, brought in the District Court of the United States for the Western District of Missouri, St.

Joseph Division, by the Firemen's Insurance Company of Newark, New Jersey, a corporation, petitioner, against A. Walter Smith and Virginia Smith, respondents herein, for the purpose of securing an adjudication as to liability, if any, under a policy of fire insurance issued by the Firemen's Underwriters Department of the petitioner to the respondents on March 11, 1947, agreeing to indemnify them, subject to the provisions of said policy, against loss and damage by fire to certain property owned by them and therein described, and the liability, if any, under said policy of the respondents to the petitioner (Trans. 1). Neither the petitioner nor the respondents demanded trial by jury as provided by the provisions of Rule 38 of the Federal Rules of Civil Procedure, but the trial court on its own motion called an *advisory jury* (Trans. 339), and at the conclusion of all of the evidence in the case submitted certain interrogatories to said jury over the objection of petitioner (Trans. 336, 337, 347). The trial court then treated the answers of the jury to said interrogatories as binding upon him and made findings of fact and conclusions of law based upon the answers of the jury to said interrogatories, and entered judgment in favor of the respondents and against the petitioner in the sum of $3871.11, together with interest at the rate of 6% per annum from June 2, 1947, and for the further sum of $387.11 as a penalty for vexatious refusal to pay the amount due under said policy, and further the sum of $500.00 attorneys' fees, being the amount requested by the respondents in their counterclaim filed in the suit and their costs therein expended (Trans. 373-377). An appeal from said judgment was taken by petitioner to the United States Court of Appeals for the Eighth Circuit, which court on February 28, 1950, affirmed the judgment of the District Court of the United States. A petition for rehearing was filed

by the petitioner herein on March 14, 1950. The United States Court of Appeals for the Eighth Circuit denied said petition for rehearing on March 23, 1950.

One of the questions involved on said appeal was whether the trial court erred in calling a jury in an advisory capacity and submitting interrogatories to it over the objections of the petitioner for the reason that it was mandatory upon the trial court to try and decide the issues without the aid or advice of a jury, the parties having waived the right to trial by jury and having made no motion for same.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is invoked under Section 1254 of the United States Code (United States Code, Title 28, Section 1254).

III.

QUESTIONS PRESENTED.

The question herein presented is whether the United States Court of Appeals erred in holding that the trial court did not err in calling an advisory jury and whether the United States Court of Appeals in so holding has correctly interpreted and applied the provisions of Rule 39(c) of the Federal Rules of Civil Procedure.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT.

The decision of the United States Court of Appeals for the Eighth Circuit in this case holding that the trial court did not err in calling an advisory jury, is directly in conflict with the decision of the United States Court of Appeals for the Tenth Circuit in the case of *Hargrove* v. *American Cent. Ins. Co.*, 125 F. 2d 225, 228-229.

V.

PRAYER FOR WRIT OF CERTIORARI.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings in the case entitled on its Docket No. 14,045, *"Firemen's Insurance Company of Newark, New Jersey, a corporation, Appellant* v. *A. Walter Smith and Virginia Smith, Appellees"* to the end that this cause may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Eighth Circuit be reversed by the court, and for such further relief as to this court may seem proper.

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION,
By DONALD N. CLAUSEN,
HERBERT W. HIRSH,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. .....

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION,
Petitioner,

vs.

A. WALTER SMITH AND VIRGINIA SMITH,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit appears at pages 388 to 401 of the Transcript of Record.

II.

JURISDICTION.

The jurisdiction of this court is invoked in accordance with Section 1254 of the United States Code (United States Code, Title 28, Section 1254).

III.

STATEMENT OF THE CASE.

Our statement of the case appears in the preceding petition under heading I (page 1), which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

The United States Court of Appeals for the Eighth Circuit erred in holding that the District Court of the United States in this case did not err in calling an advisory jury.

V.

ARGUMENT.

Summary of Argument.

POINT A.

Unless Trial by Jury Is Demanded by the Parties to a Declaratory Judgment Proceeding Presenting Legal Issues as Provided in Rule 38(b)(c) of the Federal Rules of Civil Procedure, They Are Presumed to Have Waived the Right, and the Court May Not Order a Trial by Jury On Its Own Initiative; Where the Court Does so and Treats the Findings of Such Jury as Binding Upon Him, Such Action Constitutes Reversible Error.

Hargrove v. *American Cent. Ins. Co.*, 125 F. 2d 225, 228-229.

POINT A.

Unless Trial by Jury Is Demanded by the Parties to a Declaratory Judgment Proceeding Presenting Legal Issues as Provided in Rule 38(b)(c) of the Federal Rules of Civil Procedure, They Are Presumed to Have Waived the Right, and the Court May Not Order a Trial by Jury on Its Own Initiative; Where the Court Does so and Treats the Findings of Such Jury as Binding Upon Him, Such Action Constitutes Reversible Error.

In the case of *Hargrove* v. *American Cent. Ins. Co.*, 125 F. 2d 225, 228-229, the United States Court of Appeals for the Tenth Circuit said, pages 228-229:

> "The procedural remedy afforded by the Declaratory Judgment Act is neither legal or equitable, however, its utilization does not alter or invade the right

of trial by jury as at common law. It affects a complete and expeditious remedy whereby a party to a justiciable controversy may affirmatively assert any substantive right otherwise available to it in a civil action. Under the Federal rules of civil procedure, which are made expressly applicable, Rule 57, F. R. C. P., there is but one form of civil action, in which the right of a trial by jury is recognized and adequately preserved. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; 28 U. S. C. A., Sec. 400(3), rules 38 and 39, F. R. C. P.; *Aetna Casualty & Surety Co.* v. *Quarles, et al.* (4 Cr.), 92 F. 2d 321; *Pacific Indemnity Co.* v. *McDonald* (9 Cir.), 107 F. 2d 446, 131 A. L. R. 208; (*American*) *Lumbermen's Mutual Casualty Co. of Illinois* v. *Timms & Howard, Inc.* (2 Cir.), 108 F. 2d 497; *United States Fidelity & Guaranty Co.* v. *Nauer* (D. C.) 1 F. R. D. 547. Whether the issues are tendered by suit under the Declaratory Judgment Act, or as a defense to an action to recover on the policies, the rights of the parties are the same and the rule with respect to trial by jury is the same. The basic issue tendered by the pleadings and the proof is the liability of the insurer on the contracts of insurance because of the alleged fraudulent conduct and false swearing of the insured. The case is bottomed on fraud which, if proved, would vitiate the contract between the parties. *Singleton, et al.* v. *Hartford Fire Ins. Co.*, 105 Cal. App. 320, 287 Pac. 529; *Orenstein, et al.* v. *Star Ins. Co. of America* (4 Cir.,) 10 F. 2d 754; 33 Corpus Juris, page 19, Section 667.

"If the issues tendered are purely equitable, the court has the indisputable right under the civil rules of procedure to call a jury in an advisory capacity of its own initiative and to submit to them such issues of fact as he sees fit, and to accept or disregard its verdict thereon in his discretion. Or the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. Rule 39(c).

"If the issues tendered by the pleadings are purely

legal, the parties are entitled to a jury as of right, rule 38(a), when demanded as provided in rule 38(b)(c). If no demand is made as provided for in subdivisions (b) and (c), the parties are deemed to have waived the right of trial by jury, but the court may in its discretion, upon motion of either party, order a jury trial of any or all issues, notwithstanding waiver under 38(b)(c), but may not order trial by jury on its own initiative. 3 Moore, Federal Practice, 3030, Sec. 39.03.

"If the issues tendered by the pleadings are both legal and equitable, the court may, by the same procedure and in the same action, submit to the jury both legal and equitable issues, observing the same rules as above outlined with respect to the rights of the parties. The consideration to be given to the verdict of the jury depends upon the nature of the issues—whether legal or equitable. 3 Moore, Federal Practice, 3017. If the insured had filed suit on the policies, the asserted remedy would have been legal in its nature and either party would have been entitled to a jury on timely demand as provided by the rules of civil procedure. In this event, the insurers could have asserted the same remedy as a legal or equitable defense to the legal action to recover. *Pacific Indemnity Co.* v. *McDonald, supra.*

"The insurer therefore had a plain and adequate remedy at law and the issues tendered were basically legal in their nature, and the case was triable as of right by jury. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440. Cf. *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605, 111 A. L. R. 1268. *It follows that the court was not authorized of its own initiative to call a jury in an advisory capacity, when a jury was waived in the absence of a motion by one of the party litigants.*

"But the insured had only the right to insist that the cause be submitted to and tried by the court, without the advice of a jury, and that is exactly what he received. *The court wholly disregarded the verdict of the jury,* made its independent findings and

> conclusions on which its judgment is based. The verdict of the jury is no part of his judgment. The insured not only consented to the procedure, but he is not prejudiced thereby and cannot now complain. See (*American*) *Lumbermen's Mutual Casualty Co. of Illinois* v. *Timms & Howard, Inc., supra.*" (Emphasis ours.)

In the present case the trial court not only called a jury on its own initiative and submitted interrogatories to them over the objection of the petitioner, but further considered itself bound by the findings of the jury. The trial judge not only announced to counsel at the end of the trial (Trans. 339) but in his instructions to the jury (Trans. 340-347) and in his findings of fact and conclusions of law (Trans. 373-377) and in his written memorandum opinion (Trans. 355-365) repeatedly stated that he was bound by the findings of the jury. In this case the verdict of the jury is a part of the judgment of the court, as it was not in the *Hargrove* case. The findings and conclusions of the trial judge were not independent findings and conclusions which the petitioner was entitled to, and the judgment rendered by the court was erroneous for the reason that it was based on such findings and conclusions.

For the convenience of the court we wish to point out specifically those portions of the trial court's instructions, opinion and findings of fact which we believe conclusively show that in the instant case the trial court did not make independent findings and conclusions upon the issues submitted to the jury in the case. In the trial court's charge to the jury, the court stated the following:

> "• • • As the triers of the fact, the Court is bound by your (Trans. 340) finding. When you have found what the facts are, that is binding, that finding is binding upon the plaintiff, it is binding upon the defendants, it is binding upon this Court and every

Court hereafter that may have jurisdiction over this case.* (Trans. 341.)

"Your finding is final. (Trans. 341.)

* * * * *

"The Court has taken upon itself in this case to pass upon certain questions of law, and you will therefore be required only to find what the facts are, to answer certain questions which are to be propounded by (sic) you in written form. When you have answered those questions (Trans. 341), then the Court will base its judgment or decree in this case upon those findings. If you find one way, the Court will hold that the policies of insurance are valid. If your finding be another way, then the Court will find that the policies of insurance are invalid. * * * (Trans. 342.)

* * * * *

"* * * If there was an increase, if there was a fraudulent concealment of it, and if there was a change in use that increased the hazard, then the policy would be void. That the Court will determine upon your finding. * * * (Trans. 343.)

* * * * *

"* * * You will not return a verdict in this case for or against the plaintiff, but simply answer the questions which the Court has propounded to you, so that the Court may then as a matter of law enter its judgment." (Trans. 344.)

In his Memorandum Opinion, the Court said, in part, as follows:

"There was sufficient evidence to support the findings of the jury with respect to the controverted facts submitted in the interrogatories, and the court is therefore bound by the findings of the jury that the use of the insured (Trans. 360) premises for gambling and for the illegal sale of intoxicating liquor or either of them, did not increase the hazard of fire under the terms of the policy. * * *

---

* Presumably referring to the Court of Appeals and the Supreme Court.

"On this finding alone, the court would be required to hold the policy valid. * * * (Trans. 361.)

* * * * *

"In view of the findings of the jury and of the conclusions of the court with respect to the execution of the Proof * * *. (Trans. 362.)

* * * * *

"These questions were submitted to the jury, and the jury found that the risk was not thereby increased. * * *

"The jury has found in its answers * * *. (Trans. 363.)

* * * * *

"In view of the jury's findings and the failure of the evidence to reveal any suggestion of incendiarism, the court can come to but one conclusion, and that is that the * * *." (Trans. 365.)

And in the trial court's findings of fact, the court stated:

"15. In accordance with the finding of the jury, the court finds that the use of the property by the defendants for (Trans. 375) purposes other than a restaurant and dwelling did not increase the hazard of destruction of the premises by fire; that prior to the issuance of the policy the agent of the plaintiff inspected the premises and knew that the same were being used for gambling and the sale of intoxicating liquor." (Trans. 376.)

In its opinion (Trans. 388-401), the United States Court of Appeals for the Eighth Circuit emphasizes the fact that the petitioner herein did not save an objection to the calling of the jury by the trial court, and we wish to point out to this court that counsel for the petitioner did not at any time in the trial of this case acquiesce in the court's treatment of the findings of the jury as being binding upon it and in fact objected to the submission of the interrogatories to the jury (Trans. 336) and tendered to the trial court findings of fact and conclusions of law

directly contrary to the findings of the jury which the court refused to adopt (Trans. 365-372).

In summary, it is respectfully submitted that the opinion of the United States Court of Appeals for the Eighth Circuit herein is directly contrary to the prior decision of the United States Court of Appeals for the Tenth Circuit in the *Hargrove* case, and the Court of Appeals in its opinion apparently overlooked the fact that the trial court in the instant case treated the findings of the jury not as advisory but as binding upon it and accordingly did not make independent findings and conclusions of law upon the issues which were submitted to the jury and upon which its judgment is based.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reversing said decision.

Respectfully submitted,

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
Counsel for Petitioner.

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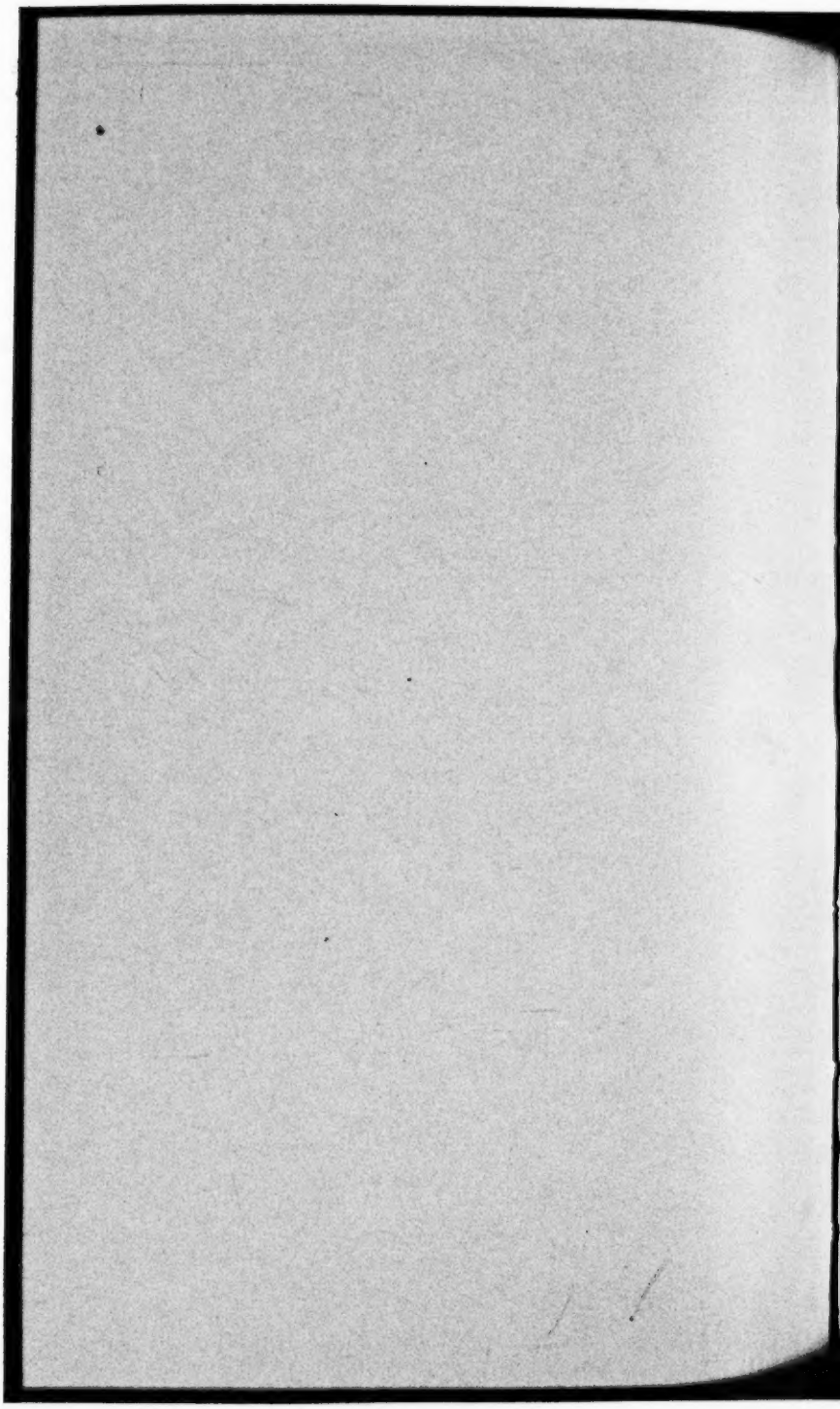
RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FERD J. FRANKENHOFF
1005 Corby Bldg.
St. Joseph, Mo.

LEWIS F. RANDOLPH
Room 1,
Donnell Court,
St. Joseph, Mo.

Counsel for Respondents



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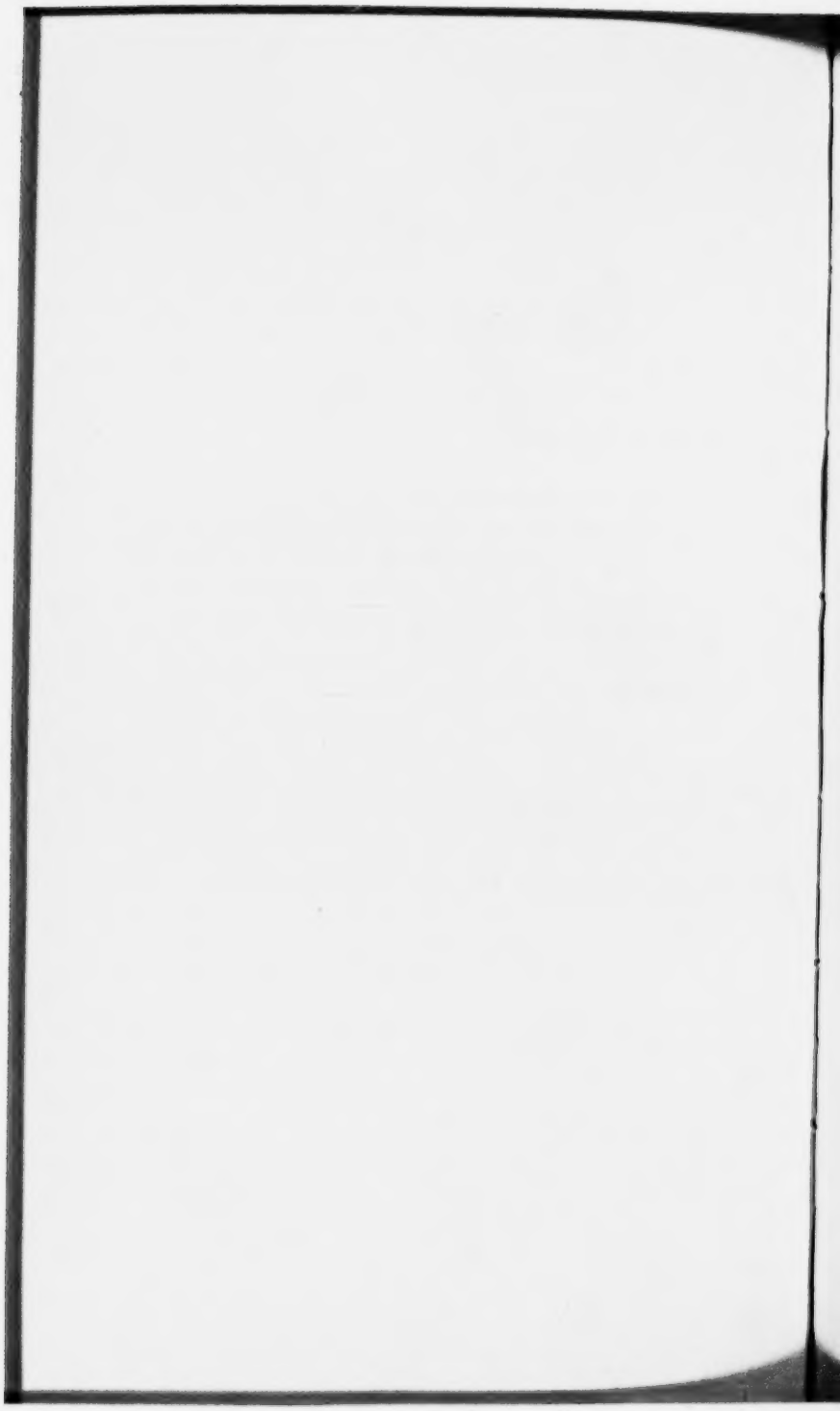

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QUESTION PRESENTED

The sole and only question presented by petitioner's application for certiorari is "whether the United States Court of Appeals erred in holding that the trial court did not err in calling an advisory jury." Petitioner contending

that the ruling of the Court is directly in conflict with the decision of the United States Court of Appeals for the Tenth Circuit in the case of *Hargrove v. American Central Insurance Co.*, 125 F. 2d 225.

SUMMARY OF ARGUMENT

Petitioner did not object to the calling of a jury as such. In fact, petitioner agreed to a trial by jury and acquiesced in the procedure by requesting the submission of issues to the jury.

Hargrove v. American Central Ins. Co., 125 F. 2d 225, l. c. 227, 228, 229.

ARGUMENT

Respondents contend that the decision of the Court is not in conflict with the ruling of the Court in *Hargrove v. American Central Insurance Co.;* that in fact, the decision is entirely in harmony with the ruling of the Court in *Hargrove v. American Central Insurance Co., supra.*

The trouble with petitioner's position in this case is that petitioner in the court below did not object or except to the action of the Court in calling a jury; in fact, petitioner expressly acquiesced in the action of the Court, and even asked the Court to submit certain issues to the jury.

In support of this contention we invite the Court's attention to Record, pages 348-351, wherein petitioner herein (plaintiff below) requested the Court to submit to the jury its Instructions 1 and 2, and also asked the submission of

certain issues, as follows (Record 348):

> "The plaintiff further excepts to the refusal of the Court to instruct the jury that — we except to the refusal of the Court to submit Instruction 1, Plaintiff's Instruction 1, to the jury.
>
> Further, the plaintiff excepts to the refusal of the Court to submit to the jury or to determine the issue of false swearing in the proof of loss which was pleaded in the complaint, and the plaintiff thinks is a material part of this case."

The United States Court of Appeals in rendering its decision in this case also found that petitioner (plaintiff below) made no objection or exception to the calling of a jury, and in fact, acquiesced therein, as is shown by the following portion of the opinion of the Court (Record, pages 390, 391, 392):

> "Appellant first contends that 'the court erred in calling a jury in an advisory capacity over the appellant's objections and submitting interrogatories to it, for the reason that it was mandatory upon the trial court to try and decide the issues without the aid or advice of a jury, the parties having waived the right to trial by jury and having made no motion for same.'
>
> "*We find no place in the record where counsel for appellant objected to the calling of a jury.* In the opinion of the court is the statement that 'Neither the plaintiff nor the defendants requested a jury . . . Prior to the time the case was called for trial, the court advised the parties that the court would, of its

own motion, call a jury to try and determine such disputed facts as might arise during the trial.'

"The record shows that a jury was examined on their voir dire and duly selected and sworn, after which counsel for each party made opening statements to the jury. At the close of the evidence counsel for appellant requested separate instructions upon the issues; but made no objections to trial to the jury. Again, after the court had instructed the jury counsel for appellant took exceptions to certain instructions given and to the failure of the court to give all the instructions requested by him.

"While the verdict of the jury is limited to answers to the three interrogatories, supra, the court's findings of fact and conclusions of law covered every issue in the case • • •

"It follows that the court did not err in calling an advisory jury. It also follows that *appellant cannot be heard to complain because it in effect agreed to trial by an advisory jury in that it saved no objection to the jury, but acquiesced in the procedure.* See the *Hargrove and Lumbermens cases, supra,* and the cases cited therein. • • •

"Further, it should be noted that the appeal here is not from the verdict of the jury but from the judgment entered by the court, and the judgment is supported by complete findings of fact on every issue." (Record 392) (Italics inserted.)

It is to be noted that the United States Court of Appeals for the Tenth Circuit cited the *Hargrove case, supra,* in supporting its ruling on the question of the District

Judge submitting issues to the jury. The conduct of the attorneys in the *Hargrove* case, with reference to the Court's calling a jury, was very similar to the conduct of the attorneys in the case at bar. Of that situation, the Court said the following in the *Hargrove* case, in upholding the District Judge (l. c. 227 & 229).

> "Neither party demanded a jury before trial and apparently at the time of the trial neither party considered that the cause was one triable of right by jury. But at the commencement of the trial, the court advised the parties that a jury would be impanelled in an advisory capacity. Neither party objected but acquiesced in the action of the court by agreeing that answers to interrogatories submitted to the jury might be returned by three-fourths or nine of the jurors. At the conclusion of the evidence, without objection from either party, the court submitted certain interrogatories which the jury answered. • • •
>
> "• • • The insured not only consented to the procedure, but he is not prejudiced thereby and cannot now complain." (l. c. 229.)

Respondents respectfully submit that petitioner has failed to show any conflict of decision, and that the writ should be denied.

Respectfully submitted,

FERD J. FRANKENHOFF,
LEWIS F. RANDOLPH,
Counsel for Respondents

The opinion in this case by the Judges of the Eighth Circuit is reported in 180 Fed. 2d 371.